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IN THE

Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL AND DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY AND SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE GRAIN PROCESSING CORPORATION'S BRIEF IN SUPPORT OF RESPONDENT MIDWESTERN GAS TRANSMISSION COMPANY'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Amicus Curiae Grain Processing Corporation concurs with the Questions Presented section of the Brief in Opposition to Petition for Writ of Certiorari of Midwestern Gas Transmission Company.

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Pursuant to Supreme Court Rule 37, Amicus Curiae Grain Processing Corporation ("GPC")[1] submits this brief supporting Respondent Midwestern Gas Transmission Company's ("Midwestern") Opposition to the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Midwestern Gas Transmission Co. v. McCarty*, 270 F.3d 536 (7th Cir. 2001) (reproduced in Pet. for Cert. App. at 1a-8a), submitted by William D. McCarty, David W. Hadley, Judith G. Ripley, Camie J. Swanson-Hull and David W. Ziegner, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission ("IURC") (collectively, "State Commissioners").

STATEMENT OF INTEREST OF AMICUS CURIAE GRAIN PROCESSING CORPORATION

GPC is a real party in interest here. GPC intervened and actively participated in the Federal Energy Regulatory Commission ("FERC") proceedings involving Midwestern's application to construct facilities to provide interstate transportation service for GPC, and it participated as an amicus curiae before the Seventh Circuit. GPC submits this brief to present its views as a directly-affected customer of the challenged Midwestern interstate transportation facilities and services and a consumer of interstate natural gas transportation services.

GPC is a manufacturer and marketer of various corn-based products with headquarters and manufacturing facilities in Muscatine, Iowa. The company recently expanded its business through construction of a state-of-the-

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[1] Counsel for GPC authored this brief in whole, and no party other than GPC and its counsel made any monetary contribution to the preparation or submission of this brief. All parties to this proceeding granted consent for GPC to file this brief.

art $300 million corn processing facility in Daviess County, Indiana. GPC requires natural gas for many aspects of its new plant's wet corn-milling processes. Pursuant to Midwestern's FERC-approved tariffs, GPC requested, and Midwestern agreed to construct, an interstate pipeline delivery point and related pipeline facilities to enable Midwestern to transport GPC-owned natural gas from Tennessee directly to GPC's new plant in Indiana. GPC has never taken transportation services or purchased gas from local distribution company ("LDC") Southern Indiana Gas and Electric Company ("SIGECO").

Reliable and economically competitive natural gas supply and transportation services are essential ingredients in GPC's ability to compete effectively in its own markets. Direct access to such services was a specific factor that GPC considered in deciding where to site its facility.

As required by Section 7(c) of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1994) ("NGA"), Midwestern sought and received from FERC a certificate of public convenience and necessity to construct and operate interstate pipeline facilities to provide interstate transportation services to GPC. 15 U.S.C. § 717f(c). FERC rejected jurisdictional and other arguments by SIGECO and approved the requested Midwestern facilities and services to GPC.[2] *No* party to the FERC proceedings sought judicial review of FERC's orders. GPC subsequently completed its new plant and has been receiving transportation service from Midwestern since 1999.

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[2] *See Midwestern Gas Transmission Co.*, 85 F.E.R.C. ¶ 61,358 at 62,396 (1998); *Midwestern Gas Transmission Co.*, 87 F.E.R.C. ¶ 61,169 at 61,671-74 (1999). FERC also determined in these orders that the service and facilities would serve the public convenience and necessity. *See Midwestern*, 87 F.E.R.C. at 61,671.

In constructing its new facility, GPC relied on the NGA and the court-approved regulatory framework for competitive natural gas markets. That framework has created a vibrant national market for natural gas based on nondiscriminatory interstate transportation of natural gas for consumers and competitive suppliers. Shippers like GPC now may contract for interstate transportation of gas among virtually any combination of available receipt and delivery points on an interstate pipeline. LDCs, producers, marketers, and end users now may sell, buy, and ship natural gas virtually anywhere on the interstate transportation grid. And, consumers such as GPC that do not want to pay LDCs for unneeded or burdensome local services can arrange for direct transportation delivery by interstate pipelines, subject to FERC review and approval. As FERC recognized in its consideration of Midwestern's application to construct the pipeline facilities to render interstate gas transportation for GPC, challenged here, "on a national level natural gas consumers," like GPC, "are better served by a competitive natural gas market that encourages improved services at lower costs." *Midwestern*, 87 F.E.R.C. at 61,671.

Within this dynamic, integrated national market for natural gas, GPC chose the sellers of gas and transportation services that best met its needs. It arranged for interstate transportation of GPC-owned gas from sources in other states directly to its Indiana plant. FERC's approval of these interstate transportation services and facilities, after considering all relevant factors, including SIGECO's objections, is entirely consistent with the statutory and regulatory framework for competitive interstate natural gas markets. Giving every state the ability to disapprove such interstate transportation or to add an additional layer of conflicting regulation or to require interposition of a local distribution company's services would balkanize interstate transportation markets and thwart the national markets for

natural gas that Congress wisely left to FERC's regulatory authority.[3]

REASONS FOR DENYING THE PETITION

Rule 10 of this Court's Rules instructs that review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Here, the Petition fails to identify any such compelling reason.

1. The Circuits Are Not in Conflict as to the Reach of FERC's Jurisdiction.

Every circuit court to consider the issue has affirmed FERC's exclusive jurisdiction over an interstate pipeline's

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[3] In its Brief in Support of the Petition (SIGECO Br. at 5-7), SIGECO argues, in effect, that requiring customers to take services from LDCs increases competition. FERC considered and rejected similar SIGECO arguments in the administrative proceedings leading to the approval of Midwestern's certificate to serve GPC:

> Under current Commission policy, we strive to honor the decision by an end-user on whether it is economic to undertake direct service from a pipeline supplier. This policy allows all participants in the natural gas market greater access to the market. The Commission has stated that it is not willing to shield local distribution companies from the effects of competitive forces, because it believes that in the final analysis, all consumers will benefit from the Commission's pro-competitive policies.

Midwestern, 85 F.E.R.C. at 62,400. Thus, FERC's policies and orders emphasize allowing customers to choose the natural gas supply and transportation options that the *customers* believe best meet their needs. "[T]he Commission is reluctant to substitute its judgment for that of end-users who select direct service from an interstate pipeline over service through an LDC." *Midwestern*, 87 F.E.R.C. at 61,671. SIGECO did not seek judicial review of FERC's determinations.

construction and operation of continuous pipeline facilities for the direct transportation of a customer's own gas from one state to the end user's facilities in another state – exactly the situation presented in GPC's arrangement.[4] Indeed, FERC (and its predecessor agency, the Federal Power Commission) have been certificating the direct transportation service and facilities for such service to end-use customers for over 60 years.[5]

The State Commissioners (*see, e.g.*, Pet. for Cert. Br. at 2, 3, 4) and SIGECO attempt to escape the reach of this consistent line of authority by characterizing Midwestern's final transportation for GPC as "local distribution" and relying on cases involving retail sales rather than interstate transportation.[6] This Court long has held, however, that the NGA grants to FERC exclusive jurisdiction over interstate

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[4] *See, e.g., Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412, 1417 (10th Cir. 1992) (stating that "the disputed matter undoubtedly falls within that grant of jurisdiction"); *Mich. Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300 (6th Cir. 1989) (stating that "[i]t is hardly conceivable that a transaction could fit more neatly into the category of 'transportation of natural gas in interstate commerce'"), *cert. denied*, 494 U.S. 1079 (1990); *Mich. Consol. Gas Co. v. FERC*, 883 F.2d 117, 121 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1079 (1990); *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392 (11th Cir. 1998); *see also Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 276 (D.C. Cir. 1990) (holding that FERC's exclusive jurisdiction over interstate transportation reaches to the "last foot of pipe" to accomplish the delivery).

[5] *See, e.g., Ark. La. Gas Co. v. Fed. Power Comm'n*, 113 F.2d 281 (5th Cir. 1940); *Panhandle Eastern Pipe Line Co.*, 3 F.P.C. 1088 (1943); *Panhandle Eastern Pipe Line Co.*, 7 F.P.C. 1121 (1948).

[6] The two cases principally relied upon by the State Commissioners do not call for a different result as both cases involved only the ability of states to regulate *retail sales* by interstate pipelines – not interstate transportation services or facilities. *See Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516-20 (1947); *Panhandle Eastern Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951).

transportation of natural gas,[7] regardless of whether such transportation is "for hire or for sale" or associated with a wholesale or retail sale.[8] "Congress' grant of sales jurisdiction as to sales for resale and the prohibition as to direct sales were meant to apply exclusively to *rate setting*, and in no wise limited the broad base of 'transportation' jurisdiction granted the [FERC]." *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 640 (1972) (hereinafter "LP & L") (emphasis added). Under the NGA, only retail sales of natural gas and low pressure, local delivery systems for making such retail sales were understood to be within the jurisdiction of the states over "local distribution." *See Fed. Power Comm'n v. East Ohio Gas Co.*, 338 U.S. 464 (1950).[9] "It is well established that the proviso [concerning local distribution] was added to the [NGA] merely for clarification and was not intended to

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[7] "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981).

[8] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300, 305 (1988); *United Gas Pipe Line Co. v. Fed. Power Comm'n*, 385 U.S. 83, 89 (1966) ("The [NGA] gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale."); *Fed. Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 636 (1972) (stating that the NGA's grant of jurisdiction to FERC "applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale").

[9] In response to *East Ohio Gas*, Congress passed § 1(c) of the NGA, 15 U.S.C. § 717(c), the Hinshaw Amendment, granting states authority over local pipeline companies that receive gas from outside the state but whose facilities do not cross any state line and do not transport gas that is ultimately transported to another state.

deprive [FERC] of any jurisdiction otherwise granted by § 1(b)." *LP & L,* 406 U.S. at 637 n.14.[10]

This Court very recently confirmed in the analogous context of the electric industry that local jurisdiction over retail sales does not limit FERC's jurisdiction over interstate transmission of electric power.[11] *See New York v. FERC,* ___U.S. __, 122 S. Ct. 1012 (Mar. 4, 2002). There, despite recent changes in the electric industry comparable to those in the natural gas industry[12] – from a regime of bundled sales to open-access transmission – the Court found the statutory language of the FPA's jurisdictional provision unambiguous:

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[10] *See East Ohio Gas*, 338 U.S. at 470-71 ("[T]he Committee Report [describes] the 'local distribution' proviso as surplusage which was 'not actually necessary.'"). In this regard, the House and Senate Committee reports underlying the NGA, H.R. Rep. No. 709, 75th Cong., 1st Sess. 3 (1937), and S. Rep. No. 1162, 75th Cong., 1st Sess. 3 (1937), stated: "That part of the negative declaration stating that the act shall not apply to 'the local distribution of natural gas' is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character."

[11] Despite some differences between the NGA and the Federal Power Act, 16 U.S.C. §§ 791a-825r (1994) ("FPA"), both empower FERC to regulate the rates and services for interstate transportation or transmission and wholesales, while leaving local distribution to state regulators. *Compare* NGA, 15 U.S.C. § 717(b) *to* FPA, 16 U.S.C. § 824(b)(1). Recognizing these similarities, the courts often have stated that the statutes are to be interpreted *in pari materia, i.e.*, precedents from one are at least presumptively applicable to the other. *See, e.g., Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271, 281 (1976).

[12] The natural gas industry went through a similar change several years before comparable power industry changes. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 283-84 (1997) (discussing the unbundling of the interstate natural gas transportation market); Richard J. Pierce, Jr., *The Evolution of Natural Gas Regulatory Policy*, 10-SUM Nat. Resources & Env't 53 (1995).

"There is no language in the statute limiting FERC's *transmission* jurisdiction to the wholesale market, although the statute does limit FERC's *sale* jurisdiction to that at wholesale." 122 S. Ct. at 1022 (emphasis added). The statutory text "*unambiguously authorizes*" FERC to assert jurisdiction over "interstate transmissions, without regard to whether the transmissions are sold to a reseller or directly to a consumer[;] FERC's exercise of this power is valid." *Id.* at 1024 (emphasis added). Given this recent decision on issues nearly identical to those raised by the State Commissioners' Petition and the lack of conflict among the circuits, there is no compelling reason for this Court to grant the Petition for Writ of Certiorari.

2. The Seventh Circuit Applied the Appropriate Abstention Standards.

The State Commissioners do not identify a split involving abstention and the implementation of the *Younger*[13] doctrine by the circuits. Instead, they allege a conflict between the Seventh Circuit's decision and this Court's *Younger* abstention jurisprudence. However, there is no such conflict. In *New Orleans Pub. Serv., Inc. v. City of New Orleans*, 491 U.S. 350 (1989) (hereinafter "*NOPSI*"), this Court states that, even where the elements of *Younger* are met, it is possible that abstention would not be warranted where a claim of preemption is "facially conclusive" or

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13 *Younger v. Harris*, 401 U.S. 37 (1971).

where the underlying state proceeding is flagrantly and patently preempted by federal law.[14]

The Seventh Circuit faithfully applied these standards, finding that the IURC's proceeding was completely and clearly preempted and that abstention, therefore, was not appropriate.[15] *See* Pet. for Cert. App. at 4a (stating that the NGA grants FERC exclusive jurisdiction over the interstate transportation of natural gas and that state regulation therefore is preempted); *id.* at 6a (stating that *Younger* abstention was inappropriate because the state has no legitimate interest in seeking to regulate activities that are clearly under exclusive federal control);[16] *cf. id.* at 3a (relying on *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n.8 (1977), which states that "principles of comity and federalism do not require that a federal court abandon jurisdiction it has properly acquired simply because a similar suit is later filed in state court."). The Seventh Circuit required no further fact-finding in reaching its conclusion that Midwestern's claim of preemption was facially conclusive, based here on

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[14] *Id.* at 366-67. There, this Court expressly refrained from deciding whether abstention was appropriate where the underlying proceeding was a state administrative proceeding. *Id.* at 369 & n.4. Also in *NOPSI*, this Court discussed an earlier case, *Pub. Utils. Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 468-69 (1943), where the Court upheld a permanent injunction where the orders of the state commission were "on their face plainly invalid." 491 U.S. at 366.

[15] The State Commissioners similarly suggest that other courts of appeals' decisions also may be inconsistent with *NOPSI*. Because, however, the Seventh Circuit's decision neither conflicts with other circuits nor Supreme Court precedent, the Court should not grant the Petition for Writ of Certiorari.

[16] This Court in *New York, supra*, recently reached a similar conclusion with respect to the FPA. There, this Court found that, if FERC acts within the scope of its federal authority, state law is conclusively preempted. 122 S. Ct. at 1023-24.

consistent case law and the NGA's unqualified grant to FERC of jurisdiction to regulate the interstate transportation facilities and services of interstate pipeline companies.[17]

3. The Procedural Posture of the Case Makes Review Inappropriate.

Allowing the IURC proceeding to go forward would be allowing an impermissible collateral attack upon FERC's orders. Under Section 19(b) of the NGA,[18] Congress has mandated that the *exclusive* remedy for those, including states and their agencies, aggrieved by a FERC order is to file a petition for review in an appropriate court of appeals.[19] *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-36 (1958) ("Congress . . . prescribed the specific, complete and exclusive mode for judicial review of the Commission's orders [under the FPA]"); *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499 (1955) ("Section 19(b) [of the NGA] reflects the policy that a party must exhaust its administrative remedies before

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[17] Preemption also is clear and complete because IURC regulation of FERC-approved facilities and transportation services to GPC would create collisions of authority and real, unavoidable conflicts. For example, it would be impossible for Midwestern simultaneously to comply with the IURC's regulation as a "public utility" and FERC's comprehensive NGA regulation of Midwestern's transportation facilities, rates and services to GPC. *Cf. Schneidewind, supra.*

[18] 15 U.S.C. § 717r(b).

[19] The NGA is replete with examples of Congress' expectation for state agencies to participate and to intervene in FERC proceedings. *See* NGA § 13 (allowing states to initiate complaints against natural gas companies); § 15 (allowing the Commission to allow states to intervene in FERC proceedings); § 17 (allowing the Commission to refer matters to boards established by the Commission composed of representatives of the states); § 19 (allowing states to file for rehearing of Commission orders). FERC's rules permit state agencies to intervene as a matter of right. 18 C.F.R. § 385.214(a)(2) (2001).

seeking judicial review."). Nor have states been reticent to participate before FERC, to seek review of FERC's orders by an appropriate U.S. court of appeals, and ultimately to file a petition for writ of certiorari with this Court. *See, e.g., New York, supra*; *Pub. Utils. Comm'n of Cal., supra.*

Permitting repeated collateral attacks on FERC decisions would undermine the stability of that agency's determinations and would frustrate the congressionally-mandated scheme for regulating interstate natural gas transportation. A breakdown in this dynamic, integrated national market for natural gas could have severe consequences for natural gas pipelines, producers, and customers, such as GPC, that need to be able to make decisions based upon the governing statutes and specific FERC orders in areas committed wholly to FERC's jurisdiction. Allowing opponents to disregard the statutorily-prescribed forums and then launch collateral attacks would undermine coherent regulation of interstate natural gas markets. This is especially true here, where FERC already has considered and approved Midwestern's facilities and services as being required by the public convenience and necessity.

Both SIGECO and the State of Indiana participated in the FERC proceeding involving GPC.[20] The IOUCC did not file a protest, request rehearing, or file a petition for review. Likewise, SIGECO was actively involved in the FERC proceeding involving GPC, raising the same jurisdictional

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[20] The State, through its agent, the Indiana Office of Utility Consumer Counsel ("IOUCC") intervened in the FERC proceedings involving Midwestern's proposed facilities to serve GPC. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940); II Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 13.4 (3d ed. 1994).

arguments it advances before the IURC.[21] Although SIGECO sought rehearing of FERC's decisions determining that FERC had exclusive jurisdiction, SIGECO did not file an appeal of those decisions to an appropriate court of appeals. Neither an agency of the State of Indiana nor SIGECO may now collaterally attack FERC's orders through the IURC proceedings.

Finally, abstention is not appropriate in instances where the underlying administrative proceeding has been stayed. Despite the State Commissioners' assertions in litigation that the federal courts should abstain based on the purported significant state interest here,[22] the IURC has not lifted the stay in the state proceeding; there simply is no active, ongoing underlying state proceeding in favor of which the federal courts should abstain.[23]

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[21] Apparently recognizing that the federal court of appeals is the appropriate avenue for SIGECO to challenge FERC's jurisdictional conclusions, the IURC stayed its own proceeding while the jurisdictional issue was resolved in federal forums, stating "we are in effect deferring the federal preemption issue for resolution by federal forums." (Opp. to Cert. App. at 57a). *In re: Southern Indiana Gas and Electric Co.*, Cause No. 41197, 1999 WL 236853, at *7 (Ind. U.R.C. Jan. 27, 1999) ("Stay Order").

[22] In its Stay Order, the IURC did not propound a strong state interest in these transactions. There, the IURC: (i) openly questioned whether it could even address the preemption issue (it acknowledged that its function is to enforce statutes entrusted to it rather than find them unconstitutional); and (ii) recognized that the weight of federal decisions indicated that "the application of the Indiana statutes . . . would not survive a federal challenge." (Opp. to Cert. App. at 55a-57a).

[23] *See Time Warner Cable v. Doyle*, 66 F.3d 867, 874 n.6 (7th Cir. 1995) (stating that there was no cause for *Younger* abstention where administrative agency stayed proceeding, pending resolution in federal court), *cert. denied*, 516 U.S. 1141 (1996).

CONCLUSION

WHEREFORE, for the reasons set forth herein, Amicus Curiae Grain Processing Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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